



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

JUL 17 2012

Senator Ben Nelson
720 Hart Senate Office Building
United States Senate
Washington, D.C. 20510

RE: MUR 6502

Dear Senator Nelson:

By letter dated October 17, 2011, the Federal Election Commission notified you of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended.

On July 10, 2012, the Commission found, on the basis of the information in the complaint and other information, that there is no reason to believe that you violated 2 U.S.C. § 441a(f). Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003) and Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74 Fed. Reg. 66132 (Dec. 14, 2009). The Factual and Legal Analysis, which explains the Commission's findings, is enclosed for your information.

If you have any questions, please contact Thomas J. Andersen, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

A handwritten signature in black ink, appearing to read "Roy Q. Luckett".

Roy Q. Luckett
Acting Assistant General Counsel

Enclosure
Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENT: Senator Ben Nelson

MUR 6502

I. INTRODUCTION

This matter was generated by a complaint filed with the Federal Election Commission by Mark Fahleson, Chairman, Nebraska Republican Party, alleging violations of the Federal Election Campaign Act of 1971, as amended ("the Act"), by Senator Ben Nelson.

II. FACTUAL AND LEGAL ANALYSIS

This matter concerns allegations that the Nebraska Democratic Party (f/k/a Nebraska Democratic State Central Committee)¹ ("NDP") made, and Senator Ben Nelson of Nebraska and his principal campaign committee, Ben Nelson 2012 ("Nelson Committee"), accepted, excessive in-kind contributions in the form of coordinated party expenditures when the NDP paid over \$450,000 to create and air a series of television and radio advertisements that featured Senator Nelson beginning in July 2011. The complainant asserts that the NDP ads satisfy the test for coordinated party communications articulated in the Act and Commission regulations because the ads constitute republication of Nelson Committee campaign materials.

As discussed below, the ads do not satisfy the content prong of the coordinated party communications test under 11 C.F.R. § 109.37(a)(2)(i)-(iii), and the Commission finds no reason to believe that Senator Ben Nelson violated 2 U.S.C. § 441a(f).

¹ On April 4, 2012, the Nebraska Democratic State Central Committee filed a Statement of Organization with the Commission changing its name to the Nebraska Democratic Party.

A. FACTUAL SUMMARY

The complaint identifies four radio and television ads funded by the NDP that featured Senator Nelson in voiceover and on camera. The complaint states that the NDP began running radio ads in July 2011 and spent \$18,602 for the radio ad buys. The complaint further states that the NDP began running television ads in September 2011 and spent \$440,563 for the television ad buys. Complaint at 3. On December 7, 2006, well before the ads aired, Senator Nelson filed a Statement of Candidacy in connection with the 2012 Senate election for Nebraska.² The transcripts of the ads, which the complaint provides, are as follows:

Radio Ad 1³ – “Promise”

Ben Nelson: There's a right way and a wrong way to cut government spending. This is Senator Ben Nelson, and I approve this message because we need to tear up Washington's credit card, but not balance the budget on the backs of senior citizens.

Some want to change Medicare into a voucher system, and privatize Social Security, risking your money in the stock market. Their ideas will drastically change Medicare and Social Security, cut benefits, and raise premiums. It's a bad idea. We made a promise to seniors and I intend to keep it. I will vote to cut spending, but I will not vote to destroy Medicare and Social Security.

Stand with me. Go to SaveNebraskaSeniors.com, and sign my online petition to protect Social Security and Medicare. Tell Washington to keep their hands off your retirement, and get their own house in order. Remember, go to SaveNebraskaSeniors.com.

Paid for by the Nebraska Democratic Party and authorized by Ben Nelson.

Radio Ad 2⁴ – “Wrong Way”

Ben Nelson: I said there is a right way and a wrong way to cut spending. Unfortunately Congress chose the wrong way. This is Senator Ben Nelson. I approve this message to let you know why I voted against raising the debt limit.

² On December 27, 2011, Senator Nelson announced that he will not seek reelection in 2012. See http://www.bennelson.senate.gov/press/press_releases/statement-by-senator-ben-nelson-on-his-plans-for-2012.cfm.

³ Available at <http://www.youtube.com/watch?v=s2uOmbdMQNw&feature=youtu.be>.

⁴ Available at <http://www.youtube.com/watch?v=bHqwsMH9rEU&feature=youtu.be>.

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1 I voted against this so-called debt reduction plan because it left Medicare vulnerable to
2 billions in unnecessary cuts while using budget gimmicks and accounting tricks to create
3 the illusion of cutting spending now. We need to cut spending and balance the budget,
4 but not on the backs of senior citizens.

5
6 There are those that want to destroy Social Security and Medicare and turn them into a
7 voucher system or let Wall Street run it. This budget plan is the first step in that
8 direction. So stand with me. Go to SaveNebraskaSeniors.com and sign my online
9 petition to protect Social Security and Medicare. Tell Washington to keep their hands off
10 of your retirement and get their own house in order.

11
12 Paid for by the Nebraska Democratic Party and authorized by Ben Nelson.

13
14 ***Television Ad 1⁵ – “Nelson Ad”***

15
16 Ben Nelson: They don't get it. They put politics ahead of what is best for the country.
17 We need to balance the budget, but not on the backs of senior citizens, bring our troops
18 home with pride and dignity, and invest in American jobs and America's future. I am
19 Ben Nelson, I approve this message because we need to stop playing politics and find
20 common sense solutions.

21
22 On-screen disclaimer: PAID FOR BY NEBRASKA STATE CENTRAL COMMITTEE
23 AND APPROVED BY BEN NELSON⁶

24
25 ***Television Ad 2⁷ – “Skunk”***

26
27 Ben Nelson: I am Ben Nelson. I approve this message because as Governor I balanced
28 eight budgets, cut taxes 41 times and left the state with a big surplus. As your Senator, I
29 sponsored a constitutional amendment to require a balanced budget, but I voted against
30 raising the debt ceiling because Washington's budget deal didn't really cut spending, but
31 could cut millions from Medicare. Like most Nebraskans, I can smell a skunk, and that
32 deal stunk even for Washington.

33
34 On-screen disclaimer: PAID FOR BY NEBRASKA DEMOCRATIC STATE
35 CENTRAL COMMITTEE AND APPROVED BY BEN NELSON

36
37 The complaint alleges that the ads are coordinated party communications and that the

38 NDP exceeded its combined coordinated party expenditure limitation with the Democratic

⁵ Available at <http://www.youtube.com/watch?v=aGweSoQ-klc&feature=player%20embedded>.

⁶ The transcripts of the television ads in the complaint include the language “authorized by Ben Nelson” in the disclaimer; however, the ads actually include the language “approved by Ben Nelson.”

⁷ Available at <http://www.youtube.com/watch?v=QRv0HDeOnvs>.

1 National Committee ("DNC"), or that the ads exceeded the NDP's direct candidate contribution
2 limitation. Complaint at 6. *See* 2 U.S.C. §§ 441a(d) and 441a(h). The complaint contends that
3 the communications satisfy the three-part test for coordinated party communications set out at
4 11 C.F.R. § 109.37. The complaint states that the payment and conduct prongs are met because
5 the NDP paid for the communications and Senator Nelson is featured in the ads and states his
6 approval and authorization of the ads. Complaint at 6-7.

7 The complaint alleges that the content prong is satisfied because the ads disseminate,
8 republish, or distribute campaign materials prepared by a candidate, the candidate's authorized
9 committee, or an agent of the foregoing. *See* 11 C.F.R. § 109.37(a)(2)(i). Complaint at 7. The
10 "Promise," "Wrong Way," and "Nelson Ad" ads state that Senator Nelson will not balance the
11 budget "on the backs of seniors," a phrase that was used in a "tweet" posted on the Nelson
12 Committee's Twitter account on May 25, 2011. The "Skunk" ad discusses potential Medicare
13 cuts, which was the subject of a May 23, 2011 Nelson Committee tweet that stated "Nebraskans
14 can count on me to stand up for seniors and fulfill our commitments to future generations." *Id.*;
15 *see* <http://twitter.com/bennelson2012>. The complaint argues that the ads republish Nelson
16 Committee campaign materials because Senator Nelson designed the Nelson Committee tweets
17 and created them before the NDP ads aired. The complaint also alleges that the ads
18 communicate Senator Nelson's "express re-election message" and that they cannot be interpreted
19 as anything but campaign ads. Complaint at 7-8. Since all three prongs of the test for
20 coordinated party communications are satisfied, the complaint asserts, the ads must be treated as
21 a coordinated expenditure, in-kind contribution, or a combination of the two from the NDP to the
22 Nelson Committee. *Id.* at 7.

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1 The NDP's response to the complaint ("NDP Response") asserts that the ads are not
2 contributions or coordinated expenditures. NDP Response at 2. It states that the ads were
3 designed to inform Nebraska Democrats about issues before Congress and featured Senator
4 Nelson because he was the only Nebraska Democrat directly involved in the federal debate. *Id.*
5 at 1-2. The NDP Response asserts that the ads are not coordinated party communications
6 because the content prong is not satisfied. *Id.* at 2. The ads aired outside of the 90-day window
7 before any Nebraska election, did not contain express advocacy, and did not republish campaign
8 materials. *Id.* at 2-3. Citing to two similar matters recently considered by the Commission,
9 MUR 6044 (Musgrove) and MUR 6037 (Merkley), the NDP Response argues that the ads do not
10 republish campaign materials because the NDP created the ads without using any pre-existing
11 graphics, video, or audio materials produced by the Nelson Committee and because use of the
12 common phrase "on the backs of seniors" in the ad and Nelson Committee tweets does not
13 constitute republication. *Id.* at 3.

14 The Nelson Committee's response to the complaint ("Nelson Committee Response")
15 makes similar arguments: that the ads are not coordinated party communications because they
16 do not meet the content prong of the Commission's coordination regulation. Nelson Committee
17 Response at 2. The response asserts that Senator Nelson's appearance in the ads does not
18 constitute republication of campaign materials under established Commission precedent because
19 the NDP created all of the video and audio content and did not use any pre-existing campaign
20 materials of the Nelson Committee. *Id.* at 3-4. The Nelson Committee Response also contends
21 that use of the phrase "on the backs of seniors" is not republication of campaign materials
22 because it is a short, common phrase that elected officials frequently use. *Id.* at 4-5.

23 Senator Nelson did not file a response.
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B. ANALYSIS

A political party committee's communications are coordinated with a candidate, a candidate's authorized committee, or an agent of the candidate or committee when the communication satisfies the three-pronged test set forth at 11 C.F.R. § 109.37: (1) the communication is paid for by a political party committee or its agent; (2) the communication satisfies at least one of the content standards set forth in 11 C.F.R. § 109.37(a)(2); and (3) the communication satisfies at least one of the conduct standards set forth in 11 C.F.R. § 109.21(d).⁸ The payment by a political party committee for a communication that is coordinated with a candidate must be treated by the political party committee as either an in-kind contribution to the candidate or a coordinated party expenditure. 11 C.F.R. § 109.37(b). The costs of a coordinated communication must not exceed a political committee's applicable contribution or expenditure limits set forth in the Act.

Thus, here, the NDP could not contribute more than \$5,000 to the Nelson Committee⁹ or make over \$126,100 in coordinated party expenditures on behalf of the Nelson Committee. *See* 2 U.S.C. §§ 441a(a)(2)(A) and 441a(d)(3)(A). In addition, the Nelson Committee and Senator Nelson could not knowingly accept an excessive contribution. 2 U.S.C. § 441a(f).

1. Payment

In this matter, the payment prong of the coordinated communications test is satisfied because the NDP, a political party committee, admits that it paid for the ads. NDP Response at 1; *see* 11 C.F.R. § 109.37(a)(1).

⁸ The NDP and the Nelson Committee do not dispute that the conduct prong was satisfied. *See* NDP Response at 2-3 and Nelson Committee Response at 3.

⁹ The contribution limitation of \$43,100 cited in the complaint reflects the contribution limit to a Senate candidate per campaign shared by the national party committee and the Senatorial campaign committee. 2 U.S.C. § 441a(h).

2. Content

The content prong is satisfied where the communication meets one of the following standards: a public communication that republishes, disseminates, or distributes candidate campaign materials; a public communication containing express advocacy; or a public communication that refers to a clearly identified federal candidate that was publicly distributed or disseminated 90 days or fewer before a primary or general election, and was directed to voters in the jurisdiction of the clearly identified candidate. 11 C.F.R. § 109.37(a)(2)(i)-(iii).

The ads aired more than 90 days before any primary or general election in Nebraska and thus do not satisfy the timing standard articulated in the content prong. *See* 11 C.F.R. § 109.37(a)(2)(iii).

Although the complaint does not specifically allege that the ads contain express advocacy, it contends that the ads communicate Senator Nelson's "express re-election message" and that they cannot be interpreted as anything but campaign ads. Complaint at 7-8. Nonetheless, the ads do not contain express advocacy. *See* 11 C.F.R. § 109.37(a)(2)(ii).

Under the Commission's regulations, a communication contains express advocacy when it uses phrases such as "re-elect your Congressman," "vote against Old Hickory," or "Bill McKay in '94," or uses campaign slogan(s) or individual word(s), which in context have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate. 11 C.F.R. § 100.22(a). The Commission's regulations also provide that a communication will be considered express advocacy if it contains an "electoral portion" that is "unmistakable, unambiguous, and suggestive of only one meaning" and about which "reasonable minds could not differ as to whether it encourages actions to elect or defeat" a candidate when

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1 taken as a whole and with limited reference to external events, such as the proximity to the
2 election. 11 C.F.R. § 100.22(b).

3 The NDP ads do not contain express advocacy under 11 C.F.R. § 100.22. Although
4 Senator Nelson appears in the ads, the ads do not acknowledge his candidacy, and all of the ads
5 are focused on legislative issues, including the debt ceiling, Social Security, and Medicare.
6 Some of the ads, including “Promise” and “Wrong Way,” contain a specific call to action to visit
7 the website SaveNebraskaSeniors.com. Thus, the ads cannot meet the content prong based on
8 express advocacy.

9 The complaint argues, and the responses dispute, that the ads republish Nelson
10 Committee campaign materials because Senator Nelson personally appears in the ads and
11 because the ads contain phrases or themes from Nelson Committee tweets. But these facts do
12 not amount to republication. *See* 2 U.S.C. § 441a(a)(7)(B)(iii); 11 C.F.R. § 109.23(a).

13 Prior Commission “analysis of republication [has] involved pre-existing material
14 belonging to or emanating from the campaign.” MUR 6044 (Musgrove) Statement of Reasons of
15 Commissioners Walther, Petersen, Bauerly, Hunter, and McGahn at 4 *citing* MUR 5743 (Betty
16 Sutton for Congress) and MUR 5672 (Save American Jobs Assoc.). In MUR 6044 (Musgrove),
17 the Commission found that a candidate’s appearance and participation in an advertisement
18 produced and disseminated by the Democratic Senatorial Campaign Committee (“DSCC”) did
19 not constitute republication of campaign materials by the DSCC. *See id.* Following this
20 Commission precedent, in this matter, because the NDP created all of the video and audio
21 content used in the ads and did not utilize any pre-existing Nelson Committee campaign
22 materials, Senator Nelson’s appearance in the ads does not constitute republication of campaign
23 materials.

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1 Nor do the similarities between some of the ads at issue and Senator Nelson's tweets
2 suffice to establish republication. MUR 6037 (Merkley) is instructive. That MUR involved ads
3 produced by the Democratic Party of Oregon that featured a candidate and contained issues and
4 messages similar to several of the candidate's press releases. Both the party ads and the
5 candidate press releases used the phrase "respect they deserve," but also included different
6 language and phrases. The Office of General Counsel recommended, and the Commission
7 agreed, that the similarities in the materials did not rise to a level sufficient to indicate
8 republication of campaign materials, although some Commissioners did not endorse the specific
9 reasoning set forth in the First General Counsel's Report. See MUR 6037 Statement of Reasons
10 of Commissioners Hunter, Petersen, and McGahn at 1; see also MUR 2766 (Auto Dealers and
11 Drivers for Free Trade PAC) (similar sentences used in two campaigns do not rise to the level
12 sufficient to indicate republication of campaign materials because of differences in wording or
13 phrasing).

14 Here, although the Nelson Committee's tweet and the NDP ads use the phrase "on the
15 backs of seniors," that phrase is commonly used in political discourse, and the ads also contained
16 significant additional language that differed from the campaign materials. While the NDP ads
17 are thematically similar to the second Nelson Committee tweet that "Nebraskans can count on
18 me to stand up for seniors and fulfill our commitments to future generations," this also does not
19 appear to rise to the level of republication consistent with Commission precedent. And the
20 content prong of the Commission's coordination regulation is therefore not met.

21 Because the ads do not satisfy the content prong of the coordinated party communications
22 test, the NDP's payment for the ads is not a coordinated party expenditure with the Nelson

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- 1 Committee under 11 C.F.R. § 109.37(a)(2)(i)-(iii), and the Commission finds no reason to
- 2 believe that Senator Ben Nelson violated 2 U.S.C. § 441a(f).

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